IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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**No. 76-1105**

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RAMSEY CLARK,

*Appellant,*

v.

J.S. KIMMITT, *et al.*,

*Appellees.*

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## REPLY TO APPELLEES' MOTIONS TO DISMISS AND TO THEIR OPPOSITIONS TO CERTIORARI

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The motions to dismiss and oppositions to certiorari submitted by appellees are based on unduly narrow views of the judicial review provisions at issue here and of this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). Because of these fundamental flaws in their arguments, appellees' contentions should be rejected and this case set for full argument.

1. In an attempt to limit this Court's appellate jurisdiction, appellees read the judicial review provision of the Federal Election Campaign Act (FECA), 2 U.S.C. § 437h,

in a constricted manner that is wholly unwarranted. Section 437h was, in effect, written on the floor of the Senate where it was adopted as an amendment to assure that this Court would quickly resolve the serious constitutional doubts about provisions such as the one-house veto, which Members of Congress recognized would fundamentally affect our form of Government. 120 Cong. Rec. 10562 (April 10, 1974). Ignoring the purpose of the provision, appellees would have this Court construe the section as if it were a carefully crafted provision of the Internal Revenue Code. Such an overly technical construction is unnecessary and would undermine the intent of Congress to have these constitutional issues resolved immediately. The statement of Judge Learned Hand when he was faced with similar arguments bears full reading:

> The defendants have no answer except to say that we are not free to depart from the literal meaning of the words, however transparent may be the resulting stultification of the scheme or plan as a whole.
>
> Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute . . . . As Holmes, J., said . . . "it is not an adequate discharge of duty for courts to say: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before. . . .' " Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

*Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (citations omitted), *aff'd*, 326 U.S. 404 (1945).[1]



In any event, appellees do not seriously dispute the fact that the Court of Appeals actually answered the first constitutional question certified to it -- whether this case presents an Article III case or controversy. Instead, appellees argue that this Court lacks jurisdiction because they disagree with the District Court's decision that this was a certifiable question. However, the Court of Appeals' decision -- that a voter challenging a one-house veto provision does not present an Article III case or controversy -- effectively declares unconstitutional that part of Section 437h(a) giving "any individual eligible to vote" the right to maintain a constitutional challenge to the Election Act. Thus, certified question I *does* raise a question of the "constitutionality of this Act" under Section 437h(a), albeit one raised by the very attorneys hired by Congress to defend, not attack, the constitutionality of the Act. Because the Court of Appeals ruled on this constitutional question

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[1] Appellees' reliance on cases interpreting the jurisdiction of this Court on direct appeals from three-judge courts fails to take into account the FECA's differing statutory scheme and its specific purpose to allow appeals on certified questions from the en banc court of appeals to this Court.

which was properly certified to it, there is a direct appeal to this Court under Section 437h(b).

2. Insofar as the decision below is based on a non-constitutional doctrine of judicial prudence, it flies in the face of the Congressional command of Section 437h that Article III jurisdiction be exercised to its fullest extent. *Buckley v. Valeo, supra,* 424 U.S. at 11-12. Moreover, the lower court's alternative holding -- that Congress cannot command the judiciary to act contrary to the non-constitutional rules of judicial prudence (App. II at 18-19 n.11) -- is not only wholly unprecedented, but directly contrary to a long line of decisions of this Court holding that Congress can by statute overcome non-constitutional justiciability defenses.[2] Whether the Congressional decision to do so was wise public policy is, of course, not a question for judicial review.

3. The decisions of both Houses of Congress not to veto the FEC regulations do not, as appellees have suggested, "dramatically underscor[e] the correctness of the decision below."[3] Rather, they highlight the fact that the injury to appellant occurs even where, as here, use of the veto power is unnecessary because the threat of a veto was itself enough to enable Members of Con-

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[2] *E.g., Warth v. Seldin,* 422 U.S. 490, 514 (1975); *United States v. Richardson,* 418 U.S. 166, 193-96 (1974) (Powell, J., concurring); *Linda R. S. v. Richard D.,* 410 U.S. 614, 617 n.3 (1973); *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 212 (1972) (White, J., concurring); *Sierra Club v. Morton,* 405 U.S. 727, 732 (1972); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 154 (1970).

[3] *E.g.,* Appellee Henshaw's Motion To Dismiss Appeal And Brief In Opposition to Certiorari 2 (April 8, 1977) (hereinafter "Henshaw Br. ").



gress to secure changes in the FEC's regulations prior to their submission to Congress (Stip. ¶¶ 63-76, App. I at 69a-71a; App. I at 73a-79a; App. II at 54-57, 86-91, 113-15). Just as the President uses the threat of a veto to change legislation, Congress has used the threat of its one-house veto to change FEC regulations. If a criminal aims a gun at his victim's head, he need not pull the trigger in order to obtain the victim's wallet.

4. Although the court of appeals in *Buckley* ruled that the constitutionality of the composition of the FEC was not ripe, this Court decided that legal issue, and it should follow the same approach in this case.[4] In Section 437h Congress has directed the Court to give speedy and certain review to constitutional questions under the FECA, a mandate also dictated by the need for a decision prior to the 1978 elections. The record before this Court is as complete as necessary to resolve this issue. Each party had the opportunity to make the record, and, indeed, appellees were granted the opprotunity, which they exercised only once and then at appellant Clark's request, to supplement the record with certain transcripts (Stip. 61, App. I at 68a; Stip. 64, App. I at 69a-70a). Their present complaints that the record is inadequate -- without pointing to a single missing fact or a single issue of fact which remains in dispute -- is nothing but a smokescreen thrown up

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[4] Moreover, this Court does have the benefit of opinions on the merits by Judge MacKinnon of the Court of Appeals (App. II at 97-109), as well as Mr. Justice White of this Court. *Buckley v. Valeo,* 424 U.S. 1, 282-86 (1976) (concurring).

in an attempt to avoid a constitutional determination on the merits.[5]

## CONCLUSION

The decision of the Court of Appeals that the statutory command to resolve this constitutional challenge at the urging of any voter violates the Article III case or controversy requirement raises a substantial constitutional question warranting this Court's plenary consideration. Likewise, the issue of the constitutionality of the one-house veto provision of the FECA, and thus of the legality of the tainted regulations prescribed pursuant to that Act, requires prompt resolution by this Court. All

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[5] Appellees' explanation for refusing to brief the merits below: (1) neglects to inform the Court that they knew, within hours of the Court of Appeals' Order, that appellant interpreted this Order to include all five certified questions, yet appellees neither revealed to appellant a differing interpretation nor requested a clarification from the Court; (2) fails to explain why the Court would have expedited the case in view of the forthcoming New York primary if a decision on justiciability was all that was contemplated; (3) fails to explain why it was necessary for them to spend several pages of their briefs below defending their decision not to brief the merits; and (4) omits to disclose that the Clerk contacted each attorney by telephone to inform him that the Court's Order requiring briefing was *not* limited to the issues of justiciability. One can thus understand Judge MacKinnon's frustration with appellees' "maneuver," which prompted him to observe that "[t]his is the first instance to my knowledge where a court has elevated such conduct on the part of a defendant into a *jurisdictional* defect" (App. II at 118-19) (emphasis in original).



five certified questions should thus be scheduled for briefing and oral argument.

Respectfully submitted,

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